HARVARD

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IN his preface to Thucydides Hobbes tells us that "They be farre more in number, that love to read of great Armies, bloudy Battels, and many thousands slaine at once, than that minde the Art, by which the Affaires, both of Armies, and Cities, be conducted to their ends." In that quaint and pedantic way one of the masters of the Science of Politics has attempted to emphasize its overshadowing importance. The expounders of that science, of which Jurisprudence is only a distinct and important branch, are divided into two schools whose methods of investigation and demonstration are radically different from each other. To a student of the older or Analytical School[1] a constitution, a code of laws or customs, present themselves as things that have existed from the very beginning in their present form. His primary duty therefore involves only such an analysis of their various provisions as will reveal the existing rules under which rights and duties are defined and remedies administered. With the history of the processes through which such constitutions or codes came into existence he has nothing directly to do; in his view the history of law is really no part of Jurisprudence; it is simply a side light which may or may not be used as an aid to interpretation. Putting aside the teachings of history, except such as are permanent in nature, and rejecting the fact that political and legal institutions can best be studied, not as arbitrary or imaginary combinations, but rather as

[1] It should be said, however, that the Analytical School is divided into two branches: the one beginning with the investigation of the abstract ideas of right and law in their relation to morality, freedom, and the human will generally; the other beginning with the actual facts of law as they now appear, when metaphysics and ethics are excluded from view. The difference, in a general way, is that which divides German expounders of *Naturrecht* from the Benthamites.

belonging to societies of definite historical types, the student of the Analytical School proceeds, with the aid of an *a priori* process, to elaborate his own conception of the inherent nature of rights and law. Such, in general terms, was the method applied to the study of the Science of Politics upon its revival by Machiavelli, Bodin, and Hobbes, after the existing state system of Europe had taken on definite and permanent form.

The group of scholars who founded, something more than a century ago, the science now known as Comparative Philology revolutionized the thought of the world not so much through the marvelous revelations of that science as by the discovery of a new method of investigation that made such revelations possible. Out of the application of the new method to fresh subject matters have since arisen Comparative Mythology, Comparative Politics, and Comparative Law. By the aid of the two sciences last named, as combined in what is generally known as the Historical Method, a flood of light has been shed upon the processes through which the aggregate, commonly called government and law, emerged from progressive history in the nations that have made the deepest impress upon civilization. The Historical Method of investigating the origin and growth of law, public and private, beginning with its germs in primitive society, attempts to explain its nature and meaning through the record of its development. The main difficulty in the way of complete demonstration is the fragmentary character of the evidence as to the initial forms of law in the early periods. Only by a comparison of such fragments as have been preserved in the survivals of ancient law or custom, in the usages of savage tribes and stagnant nations, or in the annals of a few ancient historians, is it possible to reconstruct primitive society as a complete organism. Savigny, the founder, or rather consolidator, of the Historical School, as well as his immediate followers, dealt only with Roman materials; and they applied the new method only in a very limited way to the general theory of politics. The most important outcome was embodied in Savigny's declaration that law is not the creation of the will of individuals, but the outcome of the consciousness of the people, like their social history or their language. In his famous pamphlet, *Beruf unserer Zeit*, published in 1814, he expressed the then new idea that law is a part and parcel of national life. Down to that time comparative investigation of archaic legal systems had scarcely been undertaken at all, certainly not on any considerable scale. The almost unbroken soil

of that rich and inviting field was to be turned over by the plow of one who revealed wonders. Sir Henry Sumner Maine, whose "Ancient Law" appeared in 1861, said in his preface that "The chief object of the following pages is to indicate some of the earliest ideas of mankind, as they are reflected in ancient law, and to point out the relation of those ideas to modern thought." In the masterly demonstration that followed he showed that legal ideas and institutions have a real course of development as much as the genera and species of living creatures; that they cannot be treated as mere incidents in the general history of the societies where they occur. The works of these epoch-making men — the one German, the other English — have resulted in the creation of what may be called the natural history of law.

The most important single outcome of Comparative Politics — which may be called the science of state building, the science of constitutions — is embodied in the discovery that the only two conceptions of the state known to the ancient and modern world have been and are represented by aggregations or federations in which the starting-point was the village community. In Greece the first stage in the aggregation is represented by the gathering of a group of village communities or clans into a brotherhood; the second by the gathering of brotherhoods into a tribe; the last by the gathering of tribes into a city-state. In Italy the village community appears as the *gens*. Out of a union of *gentes* arose the *curia;* out of the union of *curiae* arose the tribe; out of a union of tribes arose the city-state. Out of the settlements made by the Teutonic nations upon the wreck of the Roman Empire has gradually arisen the modern conception of the state as a nation occupying a definite area of territory with fixed geographical boundaries, the state as known to modern international law. The typical Teutonic tribe, the *civitas* of Cæsar and Tacitus, represented an aggregation of hundreds, while the hundreds represented an aggregation of townships. The typical modern state in Britain, known as England, represents an aggregation of shires; each shire an aggregation of hundreds; each hundred an aggregation of village communities or townships. The power to subdue and settle a new country and then to build up a state by this process of aggregation constitutes the strength of the English nation as a colonizing nation. By that process, capable under favorable geographical conditions of unlimited expansion, has been built up the federal republic of the United States. After thus unfolding the origin and growth of the political

constitutions of states, ancient and modern, Comparative Politics has undertaken to classify and label such constitutions as buildings and animals are classified and labeled by those to whom buildings and animals are objects of study. Not until the history of the outer shells or constitutions of states had been thus subjected to critical examination at the hands of Comparative Politics, did Comparative Law undertake to unfold the history of such bodies of interior or private law as have existed as distinct codes. The outcome is the discovery that there are existing in the world today only five distinct systems of law: the Roman, the English, the Mohammedan, the Hindoo, the Chinese. A survey of the geographical areas thus occupied discloses the fact that about nine-tenths of the civilized world is now dominated by Roman and English law in not very unequal proportions. Thus it appears that the student of the Science of Jurisprudence is directly concerned only with Roman and English law, from whose histories are to be drawn practically the entire data with which he has to deal. When the external histories of these two world codes are unfolded, side by side, the coincidences, the likenesses, are striking indeed. Each consisted at the outset of a body of customary law which became rigid and unelastic the moment it was reduced to written formulas. Long after that stage was reached each state grew into a world power with vast territorial dependencies. Thus each state was forced so to expand its meager and unelastic code of archaic law as to meet the manifold and ever-changing conditions of the after-growth. That result was worked out in each by identically the same agencies — Legal Fictions, Equity, and Legislation. Each state as it advanced manifested its conservatism by promoting law reform mainly through the agency of judge-made law, — the Roman *responsa* and the English case-law system presenting parallel processes of innovation in existing rules, made only after exhaustive discussion as to particular deficiencies revealed by the facts of individual cases. As old institutions became obsolete, they were, as a general rule, permitted simply to die out without formal abrogation. Thus at Rome as in England out of the old was slowly evolved, bit by bit, the new.

When the state system of modern Europe, in which the state as the nation is the unit, swept away and superseded the ancient state system in which the city-commonwealth had been the unit, the public law of Rome, constitutional and administrative, was rejected because inapplicable to widely divergent political conditions. What

did survive was the private civil law of family and property, of contract and tort, based on principles of natural equity and universal reason which have not lost their force with the altered circumstances of more recent times. It is that system of Roman private law which became the basis of the codes of the Continental nations, whence it passed into Mexico, Central and South America, to certain states in South Africa, as well as as to Scotland and Louisiana. On the other hand, it is the public law of England that has had the widest extension, and is exercising by far the most potent influence by reason of the fact that the English constitutional system stands out as the accepted political model after which have been fashioned the many systems of popular government now existing throughout the world. Since the beginning of the French Revolution nearly all the states of Continental Europe have organized national assemblies after the model of the English Parliament in a spirit of conscious imitation. Not, however, until the typical English national assembly, embodying what is generally known as the bicameral system, had been popularized by the founders of the federal republic of the United States, was it copied into the Continental European constitutions. Nothing is more interesting in the institutional history of the world than the approaches now being made to the constitutional system of the United States by Mexico and the states of Central and South America. In some instances in Latin America, states approach very closely, so far as their constitutional law is concerned, to the English original as modified by American innovations; in others, federal states are organized on the American plan, with certain reservations. But no matter to what extent a Mexican, Central, or South American state may adopt English constitutional law in the structure of its outer shell, its interior code of private law is invariably Roman, — a fact equally true of every Continental European state whose constitution has been founded on the English model. Jurists who view the existing state system of the world as a connected whole cannot fail to perceive, when their attention is specially directed to the subject, that within less than a century in the blending of Roman and English law there has occurred a phenomenon that marks a turning-point in the history of legal development. After centuries of growth Roman public law, constitutional and administrative, perished, leaving behind it the inner part, the private law, largely judge-made, which lives on as an immortality and universality, — as the fittest it survives. In the same way and

for the same reason English public law, the distinctive and least alloyed part of that system, is living on and expanding as the one accepted model of popular government. The phenomenon in question is presented by the blending now going on between the strongest elements of Roman and English law in the state systems of Continental Europe, in those of Latin America, and in that of the state of Louisiana. If the existing state system of France is taken as a typical illustration, we there find the outer shell of the state, the system of parliamentary government, to be purely English through deliberate and recent imitation, while the interior code of private law is essentially Roman. The same thing may be said of every other Continental European state having a parliamentary government. In the state system of Louisiana we find the outer shell of the state to be English, as modified by American innovations, while the interior private law is based on the Code Napoléon. The same thing is true of the seventeen Latin-American republics which have adopted English constitutions in the North American form, while retaining the private law drawn from Roman sources. Is it not therefore manifest that out of this blending of Roman and English law there is rapidly arising a typical state-law system whose outer shell is English public law, including jury trials in criminal cases, and whose interior code is Roman private law ?[1]

It would be hard to find any one willing to deny that the star of the Historical School of Jurisprudence is now in the ascendant. Among its many startling revelations the greatest perhaps is that which embodies the dominant idea of the nature of law itself. The world is beginning to understand that law is neither the command of an outside sovereign, nor a collection of abstract principles in force by the nature of things for all ages, but the expression for the time being of the dominant force of the community. Great jurists have said recently that " the matter of legal science is not an ideal result of ethical or political analysis; it is the actual result of the facts of human nature and history."[2] Law is a living and growing organism which changes as the relations of society change. It thus becomes the province of the Science of Jurisprudence to look behind the law into those relations of mankind which are generally recognized as having legal consequences, in order

[1] In a work recently published the writer has ventured to submit, for the first time, this far-reaching generalization to the jurists and statesmen of the world, after having subjected it in advance to the searching and approving criticism of eminent jurists in more than one nation. The Science of Jurisprudence, 1908.

[2] Pollock and Maitland, History of English Law, 2 ed., Introd., p. xxiii.

to ascertain whether or no there is unity or even resemblance in the basic conceptions that underlie them. The Science of Jurisprudence is the science of positive law, and its function is to extract from the mass of details, embodied in the several systems of positive law enforced by the political sovereignties composing the family of nations, the comparatively few and simple basic legal conceptions that underlie the infinite variety of legal rules. As Austin has well expressed it: "The proper subject of general or universal Jurisprudence is a description of such subjects and ends of law as are common to all systems, and of those resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in these several portions." The Science of Jurisprudence may be defined to be an analytical and applied science, which must be applied and reapplied to the data collected by Comparative Politics and Comparative Law as often as it may be necessary to extract from the mass of details, embodied at any given epoch in the then existing systems of positive law, the comparatively few basic ideas underlying all of them. As the science of positive law is a Roman creation, Jurisprudence a Roman invention, we must, according to the Historical Method, begin with an examination of the actual conditions at Rome out of which the science in question arose, in order to illustrate by the facts of history the nature of the processes through which it works out its results. Rome's relation to commerce caused an influx of foreigners whose need of law compelled, as early as 242 B. C., the appointment of a *praetor perigrenus*, whose duty it became to administer justice between Roman citizens and foreigners and between citizens of different cities within the Empire. As such *praetor* could not rely upon the law of any one city for the criteria of his judgments, he naturally turned his eyes to the codes of all the cities from which came the swarm of litigants before him. Thus we encounter what is perhaps the earliest application of Comparative Law, employed for the purpose of extracting from the codes of all the nations with which the Romans were brought into commercial contact a body of principles afterwards known as the *jus gentium*,[1] the law common to all nations. With the growth of the dominion of Rome and the consequent necessity for the extension of the code of a single city to many cities, there was a natural craving for the dis-

[1] *Itaque majores aliud* jus gentium, *aliud jus civile esse voluerunt. Quod civile non idem continuo gentium, quod autem gentium, idem civile esse debet.* De Off., iii. 17, 69.

covery of legal principles capable of universal application. In response to such a demand Comparative Law collected the data, and a certain branch of Greek philosophy supplied the theory upon which they could be worked into a consistent whole. The philosophic element was the Stoic conception of a law of nature, a universal code from which all particular systems were supposed to be derived and to which all tended to assimilate. If, through a reapplication of the Science of Jurisprudence to the data collected by Comparative Politics and Comparative Law from all existing codes, a new *jus gentium* should be established for the modern world embodying a uniform conception of legal right, there could be no difference of view as to the inestimable value of the result. The only question is as to the possibility of its attainment. The basis for such a hope is in the fact that while there are five original law systems from which existing codes are derived, there are but two in which the more important nations are really concerned. Roman and English law are now extended over perhaps nine-tenths of the globe. These two systems — the one originating in the code of a single Italian city, the other in the customs of a group of Teutonic tribes — practically divide the world between them. As more rapid intercommunication draws the nations of the world closer together, the longing increases for a modern law of the nations, that is, for a uniform conception of legal right, capable of embodiment in a code of substantive and adjective law, which must emerge, if at all, from existing codes, like the single and typical face in a composite photograph to which many features have contributed their influence.

The Historical Method has put it beyond all question that until we have first ascertained how law grew, it is impossible to understand what it is. Not until the synthesis has ended, not until the growth of all the ingredients that enter into the final composite has been traced, should the analysis begin. Not until the history of the law systems of the civilized world with which we have to deal has been drawn out by the aid of the Historical Method, should an effort be made to classify and define the elements that enter into them by the aid of the Analytical. By that process we arrive at the conclusions: (1) that the sovereign authority of the state is the ultimate source of all laws and legal institutions as they exist; (2) that a positive law, or a law properly so called, is a general rule of external human action enforced by such a sovereign political authority. Law proper should therefore be termed state

law rather than municipal, for the reason that that term, fastened on the English-speaking world by Blackstone against the protest of Bentham, has lost its original meaning with the extinction of the city-state system out of which it arose. With the predicate thus laid it is easy to contrast the internal with the external sovereignty of a state, to trace all law to its origin in three and only three sources, to examine law as the creator and preserver of legal rights, to divide law proper into public and private, and finally to subdivide each of those grand divisions into appropriate heads. After an exhaustive classification of law proper has thus been made, it is comparatively easy to differentiate it from that body of understandings between states, unenforceable by any sovereign political authority, generally known as law by analogy, or international law. When the field has thus been cleared, nothing remains for examination but that set of international rules established by comity for the prevention of conflict of laws in matters of private right. According to the writer's conception of it the Science of Jurisprudence involves the entire process through which the growth of positive law is unfolded by the Historical Method and its elements classified and defined by the Analytical, — a process whose study must inevitably become the preface to every logically organized system of legal education.

Hannis Taylor.

WASHINGTON.